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Supreme Court, U.S.
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No. 85-642

In the

Supreme Court of the United States

OCTOBER TERM 1985

CONTICOMMODITY SERVICES, INC.,

Petitioner,

v.

WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF PETITIONER

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January 23, 1986

CHAS. P. YOUNG CHICAGO

QUESTION PRESENTED

Whether Article III of the U.S. Constitution prohibits Congress from providing for the adjudication of incidental common law counterclaims as a part of a voluntarily elected reparations procedure designed to provide a forum for the speedy and efficient resolution of controversies arising under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*

PARTIES IN THE PROCEEDING BELOW

Petitioner ContiCommodity Services, Inc. was a respondent in the proceeding below in the United States Court of Appeals for the District of Columbia Circuit. Other respondents were the Commodity Futures Trading Commission and Richard L. Sandor. William T. Schor and Mortgage Services of America were petitioners in the proceeding below.

ContiCommodity Services, Inc. is a Delaware corporation wholly owned by Continental Grain Company, a Delaware corporation, and has the following subsidiaries and/or affiliates: ContiCommodity Services AG; ContiCommodity Services S.A.; and ContiCommodity Services (U.K.) Ltd.

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BRIEF OF PETITIONER

ContiCommodity Services, Inc. ("Conti") respectfully submits this brief in support of its prayer that the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case be vacated.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 740 F.2d 1262 and at 770 F.2d 211. The order of the Court of

Appeals denying the suggestions for rehearing *en banc* of the Court's initial decision is unofficially reported at 2 Comm. Fut. L. Rep. (CCH) § 22,409. The decision of the Administrative Law Judge ("ALJ") (Pet. App. G)[1] is unreported. The order of the Commodity Futures Trading Commission denying review of the ALJ decision is unofficially reported at [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 21,823.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. F) was entered on August 13, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant constitutional provisions, statutes and regulations (reproduced at Pet. App. H) are Article III, § 1 of the U.S. Constitution, § 14 of the Commodity Exchange Act, 7 U.S.C. § 18, and Regulation 12.23(b)(2) of the Commodity Futures Trading Commission.[2]

STATEMENT OF THE CASE

In order to regulate the growing commodities futures industry and to protect the investing public, Congress revamped the Commodity Exchange Act in 1974 with the adoption of the Commodity Futures Trading Act, 7 U.S.C. § 1 *et seq.* (the "Act"). As an integral part of the Act,

[1] References to materials reproduced in the Appendix to the Petition for Certiorari in this case are made as "Pet. App. ——."

[2] The relevant subject matter of Regulation 12.23(b)(2) is now codified, effective April 23, 1984, in Regulation 12.19, 17 C.F.R. § 12.19 (1984). Section 14 of the Commodity Exchange Act is relevant both as it existed at the time of the transactions here and as amended in 1983. The past and present texts of the statute and the regulations are reproduced in the Petition Appendix.

Congress created the Commodity Futures Trading Commission (the "Commission") and directed it to adopt regulations to create a reparations process as an additional dispute resolution forum, to supplement the existing forums of the courts and arbitration. Although not required to pursue a remedy in reparations, the Act allowed a customer of a commodities firm to elect to bring a reparations complaint to redress violations of the Act in a forum designed to provide a speedy and efficient alternative to litigation.

In keeping with Congress's goal of efficient dispute resolution, the Commission promulgated a regulation in 1976 to permit the Commission, once a customer had elected to invoke the reparations procedure, to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2) (1983)). Pursuant to its regulations, the Commission has routinely heard counterclaims which involve common law claims such as claims for debit balances in a customer's account.

William T. Schor and Mortgage Services of America (collectively "Schor"[3] maintained commodities futures trading accounts with Conti. Schor incurred significant trading losses, and after the accounts were closed, there remained a deficit balance due Conti of approximately $90,000. (Pet. App. B, p. 2-3). Schor and Conti each initially turned to a different forum to assert their respective positions. Conti filed an action to recover the deficit balance in the United States District Court for the Northern District of Illinois; Schor filed a reparations complaint before the Commission seeking $1.8 million in damages for alleged violations of the Act. (Pet. App. B, p. 2, 5, n.6.)

[3] Separate accounts, and separate actions, were maintained by William T. Schor and his 90%-owned company, Mortgage Services of America. For simplicity, these separate entities and actions will be referred to throughout as "Schor."

Schor moved to dismiss Conti's federal court action on the ground that the reparation action was filed first and Conti's action could be asserted as a counterclaim in the reparation proceeding. Although the district court denied Schor's motion, Conti voluntarily dismissed its federal action and filed a counterclaim in reparations, since reparations offered speedier adjudication than could the federal court. (Pet. App. B, p. 5, n.6; J, p. 1). After a three-day trial, the Administrative Law Judge ruled against Schor on all counts and in favor of Conti on its counterclaim. (Pet. App. B, p. 5.)

Schor sought review of the ALJ's decision before the full Commission. After the Commission declined review, Schor appealed to the United States Court of Appeals for the District of Columbia Circuit, pursuant to § 14(e) of the Act, 7 U.S.C. § 18(e) (1982).

Although the parties had not themselves raised the issue, the Court of Appeals on its own motion directed the parties to address whether Article III of the United States Constitution, as interpreted by this Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("*Northern Pipeline*"), permitted adjudication by the Commission of common law counterclaims.

On August 10, 1984, a panel of the Court of Appeals held that the Commission's regulation permitting common law counterclaims is an impermissible extension of Congressional authority. Although the statute and legislative history specifically and expressly refer to such counterclaims, the panel overlooked the relevant history and found that Congress had not clearly manifested its intent to authorize Commission adjudication of common law counterclaims:

> Discovering no explicit congressional intention to do so, we conclude that the CEA [the Act] does not authorize the Commission to adjudicate Conti's breach of contract counterclaims. (Pet. App. B, p. 12.)

The panel declined, therefore, to actually reach the question of whether the Congressional grant of counterclaim

authority would violate Article III as construed by *Northern Pipeline*. In so doing, however, the court below did not consider an express reference in the legislative history of the Act in which Congress stated its understanding that the Commission is authorized to hear all counterclaims arising out of the subject matter of disputes in reparations. When the Act was amended in 1983 (after this Court's ruling in *Northern Pipeline*), the House Committee Report reviewed the status and the purpose of counterclaims in connection with an amendment to enhance enforcement provisions:

> [S]ince the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts, the bill would create appropriate sanctions against a claimant who has failed to honor a reparations award in favor of the counterclaimant.

H.R. Rep. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904 (emphasis added); *See also* S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982).

When Congress created the reparations remedy in 1974, it intended to provide a forum for efficient and expeditious adjudication of customer claims. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978). In keeping with this purpose, Congress expressly provided in the 1974 amendments that the Commission would have jurisdiction to hear counterclaims brought by a broker against its customer. The Act, as amended in 1974, required a nonresident complainant to post a bond double the amount of the claim to cover costs and attorneys' fees if the respondent prevails and to pay any reparation award entered against the complainant "on any counterclaim." Pub. L. No. 93-463, § 106, 88 Stat. 1389 (1974) (codified at 7 U.S.C. § 18(d) (1976)).

In its 1974 enactment, Congress did not attempt to enumerate the types of counterclaims which are within the jurisdiction of the Commission. Instead, Congress directed the Commission to adopt appropriate regulations defining its

counterclaim jurisdiction. The House Committee on Agriculture, which sponsored the bill, stated in its report:

> Counterclaims will be recognized in the proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

H.R. Rep. No. 975, 93rd Cong., 2d Sess. 23 (1974).

In 1976, the Commission adopted Regulation 12.23(b)(2), which provides:

> an answer may set forth as a counterclaim facts alleging a violation and a request for reparation award that would be a proper subject for a complaint under § 12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2) (1983)). In its regulation the Commission borrowed from Rule 13(a) of the Federal Rules of Civil Procedure, which defines a counterclaim as one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed.R.Civ.P. 13(a).

In 1983, Congress extended the authorization of the Commission for an additional four years and amended the reparations provisions of the Act by adding a section permitting the Commission to promulgate "such rules, regulations and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section." Pub. L. No. 97-444, § 231(b), 96 Stat. 2319 (1983) (codified at 7 U.S.C. § 18(b) (1982)). Congress concluded that such a grant of broad discretion would enable the Commission to streamline the reparations process. *See* H.R. Rep. No. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. &

Ad News 3871, 3904; S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982). The new section expressly authorized the Commission "without limitation" to promulgate rules and regulations concerning "the nature and scope of . . . counterclaims . . . ." Pub. L. No. 97-444, § 231(b), 96 Stat. 2319 (1982) (codified at 7 U.S.C. § 18(b) (1982)).

The 1983 amendments also provided a new method for enforcing a counterclaim award. The Act, as it existed before the 1983 amendments, penalized a registered broker who failed either to pay a reparations award or to file a timely notice of appeal. Under those circumstances, the Act prohibited the broker from trading on the contract markets and suspended his registration until he complied with the Commission's order. *See* 7 U.S.C. § 18(b) (1976). The prior Act did not, however, penalize a customer who failed to pay a counterclaim award. The 1983 amendments corrected this inequity by providing that any party who fails to pay a reparation award be barred automatically from trading on all contract markets. *See* Pub. L. No. 97-444, § 231(f), 96 Stat. 3219-20 (1983) (to be codified at 7 U.S.C. § 18(b) (1982)).

Despite this legislative history and despite the statement of Congress that "the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts," *supra*, p. 5, the Court of Appeals determined that there was no congressional intention to extend authority to the Commission to hear common law counterclaims. Although this key bit of legislative history was cited to the Court of Appeals (Commission Br., pp. 21-22), the court below did not discuss the passage in its analysis.

Similarly, the Court of Appeals ignored the fact that Schor had opposed Conti's separate federal action on the ground that the action could be brought as a reparations counterclaim. Without discussion of this fact, the Court of Appeals concluded that Schor had not freely consented to the Commission's jurisdiction. (Pet. App. B, p. 25.)

Conti and the Commission each sought rehearing from the Court of Appeals. Although the petitions failed to receive sufficient votes for rehearing, Judge Wald, with Judge Starr concurring, filed a statement as to why rehearing *en banc* should have been granted:

> In sum, this is, so far as I know, the first major extension of [*Northern Pipeline*] to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas. I believe the case deserves *en banc* consideration. (Pet. App. C, p. 3.)

Conti and the Commission each petitioned for a writ of certiorari. On July 2, 1984, the court granted the writs, vacated the judgment below, and remanded for further consideration in light of *Thomas* v. *Union Carbide*, 473 U.S. —, 105 S. Ct. 3325 (1985) ("*Thomas*") (Pet. App. D). On August 13, 1985 the same panel which had rendered the original judgment reinstated that judgment. (Pet. App. E.)

SUMMARY OF ARGUMENT

The Court of Appeals' decision reaches far beyond the monetary rights of the individual litigants. It eviscerates the statutory scheme designed by Congress for dispute resolution in the commodities industry and will necessarily impact upon any other attempt by Congress to create similar procedures in other substantive areas.

Submission to reparations is a voluntary process to which the litigant must consent. This Court's opinions in *Thomas*, *Northern Pipeline* and earlier cases remove any Article III concerns as to the procedure established here by Congress;

the Court of Appeals' holding, therefore, is in conflict with this Court's holdings. To the extent that *Thomas* and *Northern Pipeline* did not settle that issue, however, this Court should settle this important question once and for all by squarely holding that litigants may consent to submission of disputes to non-Article III forums and that such consent may be implied by the voluntary election of a process which provides for the adjudication of counterclaims.

Even if the Court should find that the Court of Appeals is correct, however, that holding should only be applied prospectively and should not operate to invalidate the award on Conti's counterclaim.

ARGUMENT

I. The Decision Below Erroneously Invalidates An Act Of Congress.

In reaching its judgment in the present case, the Court of Appeals opined that Congress cannot permissibly establish a voluntary forum for dispute resolution which includes resolution of related common law counterclaims unless the adjudicatory body is vested with Article III safeguards. In so doing, the Court of Appeals invalidated an Act of Congress designed to provide a forum for countless past and potential future litigants in an important area of commercial enterprise and has cast an impenetrable barrier upon any attempt by Congress to create similar dispute resolution forums in other areas of commerce and society.

Congress created the reparations remedy with the intention that the process provide aggrieved customers of commodity firms with a voluntary alternative to litigation, which would be less expensive and speedier than litigation. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978). Pursuant to its legislative authority, the Commission adopted regulations to establish a reparations unit to handle these claims through a team of administrative law judges who have expertise in the unique jargon, principles, and mechanics of the commodities industry. Congress further provided

that counterclaims arising out of the same commodities transactions be handled as part of the reparations process. Without such a provision, that process would be practically eviscerated. A customer could not be expected to elect his remedy in reparations if the brokerage firm could, and of necessity must, bring a separate federal action for what would otherwise be a reparations counterclaim. Moreover, the existence of compulsory counterclaims, Fed. R.Civ.P. 13(a), could force the customer to counterclaim in any federal action brought by the brokerage house. Thus, without the ability to resolve the entire dispute, and with the virtual certainty that many reparations actions would be accompanied by separate court actions which would require simultaneous litigation of the same issues before two different tribunals, the rights afforded to claimants by Congress would be totally emasculated.

Although the original opinion below (Pet. App. B) is carefully crafted to appear that no constitutional question is presented, that result was reached only upon the court's inexplicable failure to address the unambiguous legislative history of the Act.

The Court of Appeals professed to find ambiguity in the legislative history of the Act by ignoring the one key passage of that history which removes any possible doubt. The court below ignored the reference which had been cited to it in the briefs which explained that "the reparation program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts." H.R. Rep. 565, 97th Cong. 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904. The Court of Appeals' total disregard of this passage is inexplicable.

At the time that it amended the Act in 1983, Congress knew that the Commission had construed its statutory jurisdiction to extend to the adjudication of all counterclaims arising out of the transaction or occurrence described in a reparations complaint. Congress specifically approved of such jurisdiction since it was in total harmony with the basic

purpose of reparations to pass upon the entire controversy surrounding each claim. In circumstances such as these, where Congress had manifested a continuing concern and intention over a period of years and has confirmed that intention when revisiting the statute, such subsequent legislative history is entitled to significant weight. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *Seatrain Shipbuilding Corp.* v. *Shell Oil Company*, 444 U.S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 (1968).

There is no question that the Court of Appeals' decision invalidates an act of Congress as surely as if there had been an express holding to that effect. In the minority statement filed by Judge Wald as to *en banc* review, she observed:

> I would hear this case *en banc* because it results in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act ("CFTA") violations. The reparations provision has, since 1974, provided an administrative forum as an alternative to the courts for such victims to recover their losses. As a practically necessary corollary, it empowers the agency to decide counterclaims arising out of the transactions complained of and affecting the account from which the reparations will be paid. To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense in the fastmoving money world and will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims. The faster and less expensive alternative forum will be decimated.

(Pet. App. C, p. 2) (emphasis in original).

Although the Court of Appeals' decision is not technically binding in other circuits, the practical reality of the judgment will prevent the present issue from arising in other

circuits so that it might be further refined in the courts of appeals. In the wake of the present judgment, it is unclear whether the Commission will accept common law counterclaims in reparations actions. Even if it were to do so, and even as to cases already pending in the administrative pipeline, however, no prudent litigant, faced with the uncertainty created by the Court of Appeals' decision, would rely upon a reparations counterclaim to enforce its rights. Rather, litigants will of necessity be forced to bring separate federal actions to pursue the claims they would otherwise have brought as reparation counterclaims.

The Court of Appeals' decision also casts a cloud upon other forms of alternative dispute resolution, ranging from traditional forms of arbitration to the new and innovative methods which are being currently developed in an effort to unclog the overburdened court system. If, under the Court of Appeals' decision, litigants may not permissibly turn to a voluntary congressionally created dispute resolution forum, litigants must also question whether an arbitration award may be subject to a challenge for subject matter jurisdiction when an attempt is made to enforce the award through the federal courts pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982). Where any doubt exists as to the potential validity of the alternative forum, litigants will be forced to turn instead to the courts.

In one fell swoop, therefore, the decision of the Court of Appeals eviscerates an Act of Congress, deprives future litigants of a speedy and efficient forum for dispute resolution, burdens the federal courts with litigation they would otherwise not be likely to receive, and unleashes serious questions as to perhaps hundreds of judgments which the litigants had long ago assumed were settled. Further, the decision casts a shroud over all other present and future alternative dispute resolution procedures.

The Court of Appeals erred when it ignored the plain language and legislative history of the Act and concluded that Congress did not intend in 1974 for the Commission to

exercise jurisdiction over ancillary common law counterclaims.

A. *Submission Of Common Law Counterclaims To Commission Reparations Is Consensual.*

The Court of Appeals also erroneously found that the hearing of counterclaims is not consensual, by ignoring the undisputed record on that subject. In the instant case, Schor elected, as do all reparations complainants, to have his claim adjudicated in a reparations proceeding. In so doing, he expressly consented to the submission of his reparations claim to a non-Article III tribunal. In addition, he necessarily consented to adjudication by the Commission of any counterclaim against him.

Certainly, at the time that he filed his reparations claim, Schor knew that Conti could assert a counterclaim against him in a reparations proceeding. The then-current regulations of the Commission empowered the adjudication of a counterclaim if it "arise[s] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (codified in 17 C.F.R. § 12.23(b)(a) (1983)).

Moreover, Schor expressly *demanded* that Conti proceed on its counterclaim in reparations rather than before an Article III court. Before it learned that Schor had filed a reparations claim, Conti had already filed suit in the United States District Court for the Northern District of Illinois to collect the deficit in Schor's account. Schor moved to dismiss the federal action on the ground that Conti should be required to seek relief by filing a counterclaim in reparations. (Pet. App. J, p. 1). The district court denied the motion. Nevertheless, because the reparations trial was scheduled before the court trial, and in reliance upon assurances from Schor that Conti could assert its claim as a counterclaim in reparations, Conti voluntarily dismissed its federal court action. Under these circumstances, the panel was patently incorrect when it concluded (Pet. App. B, p. 25)

that Schor did not knowingly consent to adjudication of Conti's counterclaim by the Commission.

A claimant need not invoke the Commission's reparations jurisdiction, but when he does, he necessarily consents to "take the bitter with the sweet." *Arnett* v. *Kennedy*, 426 U.S. 134, 153-54 (1974). So long as a claimant remains free to avail himself of the choice of presenting his claims to an Article III court, the additional right to have his claim adjudicated by the Commission, subject to the possibility that a counterclaim will be filed and decided, can no more offend Article III than does voluntary submission to arbitration, with the attendant possibility of a counterclaim.

B. *Litigant Consent Obviates Article III Concerns.*

In reaching its conclusion that common law counterclaims cannot be heard in reparations even with litigant consent, the Court of Appeals looked for but professed to find no guidance in *Northern Pipeline* or elsewhere in this Court's prior decisions in dealing with the litigant consent issue (Pet. App. B, p. 24):

> The most we can fairly say of *Northern Pipeline* is that it provides no "determinative principle" for evaluating the constitutionality of non-Article III adjudicatory schemes that operate only with the litigants' consent.

If, as the Court of Appeals found, the issue was not adequately settled in *Northern Pipeline*, it certainly was in *Thomas*, when Justice O'Connor stated the holding of *Northern Pipeline*:

> The Court's holding in that case [*Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review.

Thomas, at 105 S. Ct. 3334-35. (Emphasis added.) The Court of Appeals ignored this clarifying language on remand.

Northern Pipeline did not command a majority opinion but was decided with the confluence of a plurality opinion and a concurring opinion. The plurality found that Congress had impermissibly vested bankruptcy courts, which do not enjoy Article III attributes, with jurisdiction over common law claims. The concurring opinion, however, was more narrowly drawn; Justice Rehnquist limited his concurrence by noting that the bankruptcy courts at issue in *Northern Pipeline* did not acquire their jurisdiction with litigant consent:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III of the United States Constitution.

Northern Pipeline, 458 U.S. at 91 (emphasis added).

While a single opinion could not command five votes in *Northern Pipeline*, a majority of the justices did agree that the absence of consent to adjudication by bankruptcy judges was fatal to the Bankruptcy Act and integral to the Court's holding. Justices Rehnquist, O'Connor, White and Powell, together with the Chief Justice, authored or concurred in opinions which referred to the absence of consent as a critical flaw in the Bankruptcy Act, 458 U.S. at 91, 92, 95.

As noted above, the *Thomas* decision unambiguously articulated that consent is a critical element in determining the propriety of adjucations by non-Article III courts.

This Court has consistently upheld the consensual reference of disputes to non-Article III tribunals. In *Heckers* v. *Fowler*, 69 U.S. 123 (1865), the Court upheld the consensual assignment of a trial to a referee. In *Kimberly* v. *Arms*, 129 U.S. 512 (1889), the Court held that, upon the consent of the parties, a master could hear a matter and report findings of fact and law to the judge, who was to treat the findings as presumptively correct. The Court has also consistently held that under the 1898 Bankruptcy Act the parties have the right to consent to have all issues, including state common law claims, resolved by a referee. *See Katchen* v. *Landy*, 382

U.S. 323 (1966); *Cline* v. *Kaplan*, 323 U.S. 97, 98-99 (1944); *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-69 (1932). More recently, the Court has held that parties may consent to arbitration to resolve their disputes. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974).

The cases in which the Court has upheld consent to a non-Article III forum have one common feature. In each case Congress has provided the parties with an alternative—not a substitute—to an Article III court. As long as an Article III judge is available to decide the dispute, the Constitution's requirement of separation of powers has been satisfied.

Under the Commodity Exchange Act, a customer may turn to an Article III Court to resolve a dispute;[1] he may also

[1]There is no question that Schor believed that a federal forum was available to him. When Conti filed a federal action to pursue Schor's debit balance, Schor filed a counterclaim asserting his claim under the Commodity Exchange Act.

At the time of the transactions described in Schor's reparations complaint, most federal courts which had considered the question upheld the right of commodity customers to bring private actions for damages under the Act. *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Booth* v. *Peavy Company Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Arnold* v. *Bache & Co.*, 377 F.Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F.Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hamill & Co.*, 341 F.Supp. 764 (E.D. La. 1972); *Anderson* v. *Francis I. DuPont & Co.*, 291 F.Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F.Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

In *Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir. 1973), the court of appeals upheld a private right of action under the Commodity Exchange Act on behalf of traders against a contract market and certain of its member firms. Thereafter, the Supreme Court assumed that the Act provided the plaintiffs with a private cause of action, but reversed on primary jurisdiction grounds, holding that the plaintiffs should be required, before filing suit, to pursue their claim in an administrative forum. *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 115 (1973). The law was so well

(footnote continued on next page)

elect to proceed in arbitration, or in reparations. The Act does not abrogate the Article III remedy; it merely provides a voluntary alternative.

To the extent that the Court of Appeals in the instant case found that the presence of litigant consent does not obviate Article III problems, that decision is in conflict with this Court's holdings in *Northern Pipeline*, *Thomas*, and previous decisions.

Twelve circuit courts of appeals have considered the holding of *Northern Pipeline* in the context of the constitutionality of § 636(c) of the Federal Magistrates Act, 28 U.S.C. § 636(c) (1982). *Bell & Beckwith* v. *United States of America*, 766 F.2d 910 (6th Cir. 1985); *Gairola* v. *Commonwealth of Virginia*, 753 F.2d 1281 (4th Cir. 1985); *D.L. Auld Co.* v. *Chroma Graphics Corp.*, 753 F.2d 1029 (Fed. Cir. 1985); *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985); *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Brothers Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (*en banc*), *cert. denied*, — U.S. —, 105 S.Ct. 906 (1984); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 218 (1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 172 (1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (*en banc*) *cert. denied*, — U.S. —, 105 S.Ct. 100 (1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983).

(footnote continued from preceding page)

settled that the Exchange in *Deaktor* did not even question the existence of a private right of action under the Act in its petition for certiorari. To the contrary, the Exchange supported its primary jurisdiction argument by noting that the "constant threat of harrassing suits" had placed it in "an intolerable position." (Pet. for cert., case no. 73-241, p. 11).

All twelve courts of appeals reached the identical ultimate conclusion that the Federal Magistrates Act does not run afoul of Article III. In arriving upon their judgments, most of the courts focused to some extent on both (1) the element of consent present in the reference of cases to federal magistrates and (2) the degree of control exercised over magistrates by Article III judges. While two of the circuits stressed the control factor (*Collins* and *Pacemaker*, *supra*), four circuits placed primary emphasis on the consent element (*Fields*, *Geras*, *Goldstein*, and *Wharton-Thomas*, *supra*). The relationship between magistrates and the federal judges who appoint and control them is so strong and so obvious that it could hardly be ignored in considering the Magistrates Act. However, two court of appeals held that litigant consent *alone* satisfies an Article III analysis. (*United States* v. *Dobey* and *Bell & Beckwith* v. *United States*, *supra*).

Significantly, the D.C. Circuit itself, in its own Magistrates Act case, placed paramount importance upon the consent issue. In *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 894 (D.C. Cir. 1984), Judge MacKinnon[3] found "virtually dispositive" this Court's decision in *Heckers* v. *Fowler*, 69 U.S. 123 (1865), which upheld the consensual submission of a trial to a referee.

When this Court addressed the issue of the interaction of Article III of the United States Constitution and the power of Congress to establish procedures for the adjudication of rights in *Northern Pipeline*, it took on "an area of constitutional law . . . with . . . frequently arcane distinctions and confusing precedents . . ." *Northern Pipeline*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring). Justice Rehnquist observed that "the cases dealing with the authority of Congress to create courts other than by use of its power under Article III do not admit of easy synthesis." *Id.* But despite this Court's attempts to synthesize those earlier cases and to resolve the confusion, the Court of Appeals, even with the

[3]Judge MacKinnon participated on the panel in the instant case.

guidance of *Northern Pipeline*, was left to conclude that "the jurisprudence on Article III jurisdiction is not, quite regrettably, the clearest of constitutional fields." *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893 (D.C. Cir. 1984). As already noted, *supra* at p. 14, the Court of Appeals, in deciding the instant case, concluded that *Northern Pipeline* and the various decisions then available on the Magistrates Act provided no guidance on the question of whether consent alone obviates Article III problems. Likewise, the Court of Appeals apparently found no guidance in *Thomas*.

While petitioner respectfully believes that *Northern Pipeline* and *Thomas* offer more guidance than was perceived by the Court of Appeals, the instant case presents for the first time the issue of whether consent alone, without the adjunct and control attributes inherent in the federal magistrates system, is sufficient to satisfy the separation of powers doctrine as it regulates the relationship between congressionally created rights and the protections of Article III. If there is confusion on that question, it should be eliminated to remove the uncertainty created by the instant case over whether litigants may safely turn to alternative dispute resolution forums.

II. Even If The Holding Below Were Correct, It Should Only Be Applied Prospectively.

The Court of Appeals did not address the question of whether its decision would be applied retroactively. If the Court of Appeals was correct that the Commission has no jurisdiction over common law counterclaims, all awards entered on such claims since the inception of the reparations program are subject to attack.

This Court has repeatedly recognized ". . . the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time." *Heckler* v. *Mathews*, 465

U.S. 728, 746, 104 S.Ct. 1387, 1398 (1984); *Northern Pipeline* at 87-89.

All of the litigants who submitted their disputes to reparations reasonably relied upon the legitimacy of the Commission's jurisdiction. Certainly, Conti relied upon that jurisdiction when it voluntarily dismissed its lawsuit in federal district court in 1981 to proceed in reparations. It would be a miscarriage of justice for Conti and innumerable other litigants to have their cases unraveled by a retroactive application of this decision.

CONCLUSION

Petitioner respectfully suggests that this Court's holdings in *Northern Pipeline* and *Thomas* have settled the proposition that litigant consent obviates Article III concerns over congressionally created alternative dispute resolution forums. If *Northern Pipeline* did not settle the question, however, this Court should resolve once and for all this vital question of federal law by vacating the judgment below.

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